No. 84-1491

In the Supreme Court of the United States

OCTOBER TERM, 1984

PHILADELPHIA NEWSPAPERS, INC., *et al.*,

Appellants,

v.

MAURICE S. HEPPS, *et al.*,

Appellees.

On Appeal from the Supreme Court of Pennsylvania

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED FOR REVIEW

A.

Did the Supreme Court of Pennsylvania err in upholding the constitutionality of a Pennsylvania statute which requires a defendant publisher to bear the burden of proving the truth of its publication as a defense to a private figure defamation action?

B.

Can a private figure libel plaintiff recover damages from a newspaper defendant without proving the falsity of the complained-of publication?

C.

Can the falsity of a publication constitutionally be *presumed* solely from the defamatory character of the words used?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the courts below were as follows:

Appellants (defendants below):

Philadelphia Newspapers, Inc.*
William Ecenbarger
William Lambert

Appellees (plaintiffs below):

Maurice S. Hepps
General Programming, Inc.
A. David Fried, Inc.
Brookhaven Beverage Distributors, Inc.
Busy Bee Beverage Co.
ALMIK, Inc.
Lackawanna Beverage Distributors
N.F.O., Inc.
Elemar, Inc.

*Philadelphia Newspapers, Inc. is a subsidiary of Knight-Ridder Newspapers, Inc., the stock of which is publicly owned and traded.

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OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (Jt. App. 155) is reported at ___ Pa.___, 485 A.2d 374 (1984).

The opinion of the Court of Common Pleas of Chester County (Jt. App. 108) is not reported. An earlier opinion of the Court of Common Pleas, dealing with pretrial discovery matters, is reported at 3 Pa. D&C3d 693 (Chester Cty. C.P. 1977).

JURISDICTION

The judgment of the Supreme Court of Pennsylvania (Jt. App. 181) was entered on December 14, 1984. The notice of appeal to this Court was filed on March 14, 1985. Probable jurisdiction was noted on June 24, 1985. The jurisdiction of this Court rests upon 28 U.S.C. §1257(2), in that there is

drawn into question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States, and the decision of the highest state tribunal was in favor of the statute's validity.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment I:
"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

2. United States Constitution, Amendment XIV, §1:
". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

3. Pennsylvania Consolidated Statutes, 42 Pa.C.S.A. §8343, Act of July 9, 1976, P.L. 586, No. 142 §2:

§8343. BURDEN OF PROOF

(a) *Burden of Plaintiff*. In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

(1) The defamatory character of the communication.

(2) Its publication by the defendant.

(3) Its application to the plaintiff.

(4) The understanding by the recipient of its defamatory meaning.

(5) The understanding by the recipient of it as intended to be applied to the plaintiff.

(6) Special harm resulting to the plaintiff from its publication.

(7) Abuse of a conditionally privileged occasion.

(b) *Burden of defendant*. In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

(1) The truth of the defamatory communication.

(2) The privileged character of the occasion on which it was published.

(3) The character of the subject matter of defamatory comment as of public concern.

STATEMENT OF THE CASE

A. Procedural History

This action for libel was instituted in May 1976 in the Court of Common Pleas of Chester County, Pennsylvania. Plaintiffs were Maurice S. Hepps, principal stockholder of General Programming, Inc. ("General"), General, and a number of independent corporate entities which operated beer and beverage distributorships as franchisees of General. Plaintiffs-appellees (hereafter, plaintiffs) complained of a series of articles published in *The Philadelphia Inquirer*. Suit was brought against defendants-appellants (hereafter, defendants) Philadelphia Newspapers, Inc., the publisher of *The Philadelphia Inquirer*, and two reporters for *The Inquirer*, William Ecenbarger and William Lambert.

Although the articles in suit concerned plaintiffs' involvement with, *inter alia*, high-ranking officials of the Commonwealth of Pennsylvania and alleged members of organized crime, the trial court, in a pretrial order denying defendants' Motion for Summary Judgment, ruled that plaintiffs were "private figures" who could recover for defamation upon a showing of mere negligence. (Jt. App. 58).

Trial commenced on June 8, 1981 and consumed almost six weeks. Plaintiffs had expressly alleged the falsity of defendants' articles in their Complaint (Jt. App. 15, 17, 18, 20, 22), and their counsel argued falsity vehemently and repeatedly in his opening remarks to the jury. (Tr. 5-8, 11-12). Regarding the single accusation which was the focus of the trial—that plaintiffs "had some kind of implied relationship with people involved with the Mafia" (Tr. 6)—counsel for plaintiffs told the jury: "Again, this will be shown to you, in our submission, to be a charge that is totally, dastardly false. . . ." (*Ibid.*).

In their Proposed Points for Charge, defendants requested that the trial court instruct the jury that the burden was on the plaintiffs to prove that the challenged publications were false. (Jt. App. 94). Plaintiffs requested that the trial court instruct the jury to the contrary (Jt. App. 91), a position supported by 42 Pa.C.S.A. §8343(b)(1), the Pennsylvania stat-

ute which places the burden of proving the truth of a challenged publication on the libel defendant.

After hearing extensive oral argument during a "precharge" conference, the trial court concluded that federal law required a charge to the jury that the burden of proof rested with plaintiffs. (Tr. 3589). The trial court accordingly instructed the jury that plaintiffs bore the burden of proving, by a preponderance of the evidence, that the articles were false. (Jt. App. 99).

On July 13, 1981, the jury returned a general verdict in favor of defendants. A timely Motion for New Trial challenged, *inter alia*, the court's refusal to follow the Pennsylvania "burden of proof" statute. The Motion for a New Trial was denied, and final judgment was entered on February 15, 1983. The trial court's extensive opinion held, inter alia, that the common law rule embodied in Pennsylvania's burden of proof statute, which places the burden of proving the truth of a publication on the defamation defendant, violates the First Amendment to the United States Constitution. (Jt. App. 131).

Plaintiffs filed a direct appeal to the Pennsylvania Supreme Court, pursuant to a statute permitting such appeal where a trial court of general jurisdiction has held a Pennsylvania statute invalid as repugnant to the Constitution of the United States. 42 Pa.C.S.A. §722(7). In vacating the judgment in favor of defendants and remanding for a new trial, the Supreme Court upheld the validity of the Pennsylvania statute imposing the burden of proving the truth of a publication on the defamation defendant. It rejected the argument that the First Amendment requires a different result, holding instead that "the presumption of falsity remains and the defendant has the option of proving truth as an absolute defense to the action." (Jt. App. 175).

B. Facts

1. Background

In the early 1960s, Maurice S. Hepps, the lead plaintiff in this action, developed a new concept for selling beer in the Commonwealth of Pennsylvania. Rather than making sales

from a warehouse or by delivery to customers, Hepps opened large, supermarket-style, self-service stores in shopping malls. (Tr. 2099-2108). Thereafter, he began to franchise "Thrifty Beverage" distributorships through a series of management agreements. (Tr. 2108).

Hepps' concept enjoyed commercial success, but was threatened by a bill, introduced in the Pennsylvania Legislature, which would have had an adverse impact on the stores' purchasing practices. (Tr. 2130). At this point, Hepps and William Paulosky, president of the parent corporation which controlled the Thrifty operation (Tr. 2695), contacted a legislative lobbyist named Joseph Scalleat, a long-time friend of Paulosky. (Tr. 2687). Scalleat had been identified by the Pennsylvania Crime Commission as a leader of the Cosa Nostra in northeastern Pennsylvania and a member of the Bufalino crime family. (Defendants' Exhibit 7, at p. 53, Tr. 1632, 1955-1956).

Scalleat was asked to contact an influential State Senator named Frank Mazzei for help; he did, asking the Senator to pay "closer attention" to Hepps' wishes. (Tr. 2703). Although the reasons have been disputed, Senator Mazzei did oppose the bill, which never passed. (Tr. 2155-2157).

In 1972, the Liquor Control Board ("LCB"), which regulates the sale of alcoholic beverages in Pennsylvania, issued citations against three Thrifty outlets, alleging that the management agreements violated the Liquor Code. (Tr. 1968-1969). After a hearing, the LCB suspended the stores' licenses until the outlets complied with the terms of its order. (Tr. 1969). Thrifty appealed; after the order was upheld, *In re Thrifty Beverage Distributor License*, 64 Lanc. L.Rev. 83 (Lancaster Cty. C.P. 1973), Thrifty appealed to Pennsylvania Commonwealth Court. (Tr. 1971).

While the second appeal was pending, Hepps once again called upon Senator Mazzei for assistance. This time, at Hepps' request, Senator Mazzei contacted the Governor's office and arranged for a meeting between Hepps and LCB Chief Counsel Alexander Jaffurs (Tr. 2158, 2231), a meeting which Jaffurs previously had refused to attend. (Tr. 2231).

Subsequently, the Governor fired Jaffurs. Although the reasons for the firing have been the subject of dispute, Jaffurs later told *The Inquirer* he believed his prosecution of the LCB charges against Thrifty played a role. (Tr. June 16, 1981, pp. 50, 80; *see also*, Tr. 1594). What is undisputed is that the man who replaced Jaffurs, Harry Bowytz, was recommended to the Governor by Senator Mazzei. (Tr. 3188).

During Bowytz' term, Thrifty settled its dispute with LCB and was permitted to continue operating in substantially the same way. (Tr. 1752-1754). The license suspensions for the three outlets were lifted and replaced with a fine of $1,000 per store. (Tr. 2236). Based on the agreement, Thrifty's appeal to Commonwealth Court was dismissed. (Tr. 1972).

2. *The articles at issue*

Against this background, the first of the five articles at issue here was published in *The Philadelphia Inquirer* on May 5, 1975. (Jt. App. 60). Briefly, this article reported that Senator Mazzei, later convicted of extortion in an unrelated matter, had intervened on behalf of Thrifty with the administration of then-Governor Milton Shapp during LCB proceedings against the Thrifty stores. Mazzei also recommended that a close friend be appointed by the governor as chief counsel of the LCB. Under the stewardship of Mazzei's nominee, the LCB's position in the cases changed markedly to Thrifty's benefit, even though the LCB's original position had been upheld on the first appeal. The article concluded by noting Senator Mazzei's "underworld associations," including Joseph Scalleat.[1]

1. The article also reported that the wife of Joseph Scalleat was the licensee of the chain's store in Bucks County. In fact, the distributor was Scalleat's sister-in-law, and *The Inquirer* published a correction two days later. (Jt. App. 63).

In addition, the headlines on the carryover page of some editions of the May 5 article read "State Senator Used Political Muscle to Assist Business," while other editions read "State Senator Used Political Muscle to Aid His Business." There was no evidence that Senator Mazzei had any financial interest in the business.

Several months later, on September 15, 1975, *The Inquirer* reported that federal authorities investigating the Thrifty chain had found connections between it and underworld figures. (Jt. App. 64). On January 16, 1976, the third article in suit (Jt. App. 68), reported that a federal grand jury was investigating:

> (a) the alleged relationship between the plaintiffs' chain and known Mafia figures in eastern Pennsylvania;
>
> (b) whether the chain had received special treatment from the Shapp Administration and the LCB; and
>
> (c) a possible connection between the chain and small insurance companies controlled by organized crime.

On February 5, 1976, *The Inquirer* reported that a federal grand jury was investigating ties between the Thrifty chain and Wisconsin Surety Co., which the Wisconsin Insurance Department had forced into liquidation to prevent its takeover by Michael Grasso, an identified organized crime figure in southeastern Pennsylvania, and Morton Hulse, a Thrifty stockholder and insurance underwriter. (Jt. App. 71). The article also reported that federal agents had found evidence of direct financial involvement in Thrifty by Joseph Scalleat. (*Ibid.*)

Finally, on May 2, 1976, *The Inquirer* published a lengthy article which mentioned that the Wisconsin Surety Co., the target of the aborted takeover by Grasso and Hulse, had been linked to the Thrifty chain, which in turn had connections with organized crime. (Jt. App. 74).

Plaintiffs contended in their complaint that the articles were false in stating or implying that Senator Mazzei and certain members of the "Cosa Nostra" had hidden ties to Thrifty's operation and that they used improper political influence to gain favorable governmental treatment for the Thrifty chain. (Jt. App. 15-22). Plaintiff Hepps asserted that the articles damaged his personal reputation, ascribed to him characteristics incompatible with the proper conduct of his business, and injured him in his business. (Jt. App. 15). The re-

maining plaintiffs asserted that the allegedly false statements injured their reputations with lenders, suppliers and customers, ascribed to them characteristics of dishonesty, and otherwise damaged their businesses. (Jt. App. 16). Hepps testified at trial that the "thrust" of the articles was that he was "part of the Mafia" and that, through him and his associations, Thrifty was "connected to the Mafia." (Tr. 2120-2121).

3. Defendants' evidence as to truth

Testifying as on cross-examination during plaintiff's case, reporter William Ecenbarger explained the basis for his conclusion that improper political influence was used by Thrifty. He then testified to all the facts which led him to conclude there was a link between the Thrifty chain and organized crime. (Tr. 1668-1681). These facts were summarized on a chart introduced into evidence, which was the subject of extensive testimony by both the reporter and Hepps. (Jt. App. 59). The reporter testified to facts demonstrating a relationship between Thrifty and "underworld" figures Joseph Scalleat,[2] Albert Scalleat, Sr.,[3] Louis Crocco,[4] and Morton Hulse, the insurance broker and associate of Grasso[5] and Ralph Puppo.[6] In essence, the relationship between Thrifty and organized crime was as follows: William Paulosky, president of General Programming, Inc., a holding company for the Thrifty chain, had a long association with Joseph Scalleat (Tr. 2687), an organized crime figure (Tr. 1632, 1955-1956) who acted as a legislative lobbyist for the Bufalino crime fam-

2. Identified by the FBI as the lobbyist for the Bufalino crime family (Tr. 1671) and by the Pennsylvania Crime Commission as a member of the Bufalino family. (Defendant's Exhibit 7, at p. 53, Tr. 1632, 1955-1956).

3. Identified by the FBI as a member of the Bufalino crime family. (Defendants' Exhibit 13, Tr. 1658-1659, 1955-1956).

4. Identified by the Pennsylvania Crime Commission as the central figure in sports bookmaking in Johnstown, Pennsylvania. (Tr. 1677-1681; Defendants' Exhibit 20, Tr. 1680, 1955-1956).

5. Identified as a major figure in the underworld in Miami and Philadelphia and the nephew of Angelo Bruno, the late head of organized crime in Philadelphia. (Tr. 1674).

6. Identified as the brother-in-law of Angelo Bruno. (Tr. 1674).

ily. (Tr. 1671). Paulosky successfully enlisted Scalleat's aid in dealing with Senator Mazzei (Tr. 3702, 2231), with whom he had a "very close" relationship. (Tr. 1670).

Thereafter, Mazzei became very interested in Thrifty, helping it repeatedly over the years. (Tr. 1671). Joseph Scalleat had direct financial ties to Thrifty. He appeared on the payroll of Beer Sales Consultants (Tr. 1622), a corporation operated by relatives of Paulosky, and was paid "large amounts." *(Ibid.)*. Beer Sales Consultants, in turn, received consulting fees from several stores in the Thrifty chain. (Tr. 1613-1614; 1628-1629; Defendants' Exhibit 4, Tr. 1614, 1955-1956). One of the stores was owned by Rose Scalleat, sister-in-law of Joseph Scalleat (Tr. 1676), while another employed Albert Scalleat, Sr. (Tr. 1677), also identified as a member of the Bufalino crime family. A third store was owned by the wife of Crocco, identified as a major figure in bookmaking operations.

Paulosky himself was named as an unindicted co-conspirator with Hulse and two well-known underworld figures (Tr. 1674-1675), in a scheme to defraud an insurance company. The indictment was brought pursuant to provisions of the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. §1962, *et. seq.* (Tr. 1674), designed to combat the infiltration of business by organized crime. (Tr. 1675). Hulse was a shareholder in General Programming, Inc., and was doing business with several Thrifty stores and outlets. (Tr. 1676).

The former United States Attorney for the Western District of Pennsylvania, who successfully prosecuted Senator Mazzei on unrelated charges, advised reporter Ecenbarger that federal investigators were looking into Senator Mazzei's relationship with Joseph Scalleat and the Thrifty chain (Tr. 1657-1658), and federal sources advised that a grand jury was investigating Thrifty's relationship with known organized crime figures. (Tr. 1662, 1666). Ecenbarger was later able to document the existence of the grand jury investigation. (Defendants' Exhibits 26 and 27, Tr. 1702, 1955-1956).

In addition to these specific facts, Ecenbarger was informed by federal investigators of the impetus for Thrifty's having involved itself with organized crime figures. The investigators' view was that, because the Thrifty chain was in violation of the Liquor Code from its inception, its principals knew they would need special help in having the operation approved by state government and to that end enlisted Joseph Scalleat. Scalleat worked through Senator Mazzei, succeeded in getting the form of operation approved, and then expected compensation for his services. This compensation, according to the investigators, was accomplished through payments made to Beer Sales Consultants. (Tr. 1698-1699).

4. Plaintiffs' evidence as to falsity

Throughout the six-week trial, plaintiffs attempted to demonstrate the falsity of the articles as well as the information relied upon by *The Inquirer*.

The two *Inquirer* reporters responsible for preparation of the articles at issue were questioned thoroughly over 10 days not only about the propriety of their conduct (fault), but about the factual basis for virtually every statement in the articles as well. Inconsistencies were pointed out and the alleged bias of a principal source, the former chief counsel to the Pennsylvania Liquor Control Board, was stressed. Thereafter, plaintiffs introduced two fact witnesses in an effort to demonstrate that *The Inquirer's* account of the LCB proceedings, and the alleged implication that political pressure was used to secure a favorable result, were false. (Tr. 1960-2071, 2414-2470).

With regard to the "Mafia" charge, plaintiffs introduced two other witnesses. The first, Albert Scalleat, Jr., testified that the initial article in suit was false when it reported that Joseph Scalleat's wife had a financial interest in his store. (Tr. 158). Scalleat also testified that his uncle, Joseph Scalleat, had no underworld connections. (Tr. 160). Second, William Paulosky testified to his long friendship with Joseph Scalleat, and stated that Scalleat's only connection with his company was as a salesman of mining equipment. (Tr. 2687-2689). Paulosky denied any knowledge of Joseph or Albert Scalleat's

alleged underworld connections (Tr. 2689, 2690), and testified that he did not even know two of the alleged organized crime figures with whom the defense had associated his name. (Tr. 2726). Paulosky also detailed how he participated, in his view legitimately, in the legislative process by seeking Joseph Scalleat's assistance in securing an introduction to State Senator Mazzei. (Tr. 2701-2703).

Finally, and most importantly, plaintiff Maurice Hepps testified at great length concerning the accuracy of the articles. After being asked generally about the "thrust" of the articles and the falsity of any alleged tie to organized crime (Tr. 2120-2121), Hepps detailed each alleged falsehood in the articles and offered his version of the truth. (Tr. 2221-2290). With respect to the first article alone (Jt. App. 60), Hepps identified at least 15 alleged errors. (Tr. 2221-2252). In each of these instances, Hepps placed the allegation in context, denied the accuracy of the accusation and then offered his version of the truth, often accompanied by documentation. (*Ibid.*)

For example, with regard to allegations of involvement with underworld figures, Hepps denied not only the published allegations but each of the other facts relied on by defendants. He denied that the chart (Jt. App. 59) used by the defense was accurate (Tr. 2217-2221), detailed his involvement with Joseph Scalleat and Senator Mazzei, concluding that they should not have been on the chart (Tr. 2217), and indicated that he had never heard of others listed on the chart of underworld connections. (Tr. 2217-2221). Finally, Hepps introduced testimony that he had made inquiries about Joseph Scalleat and had been informed by the United States Attorney for the Eastern District of Pennsylvania that, despite what the Pennsylvania Crime Commission had to say, there was "serious doubt" that Scalleat was "anything" in the Costa Nostra. (Tr. 2267).

Plaintiffs thus had detailed information available to them regarding the bases for the newspaper articles, and they produced considerable evidence in their attempt to prove falsity.

SUMMARY OF ARGUMENT

This Court has properly held in *New York Times Co. v. Sullivan* and its progeny that the First Amendment forbids the recovery of damages by a public official/figure libel plaintiff unless he proves both the falsity of the defamatory statement and that such falsity resulted from defendant's fault, *i.e.*, knowing or reckless disregard for truth. The question presented by this appeal is whether a private libel plaintiff, who is permitted to recover on a lesser showing of fault, is excused from the burden of proving the falsity of the defamatory language. Unless this Court is to disregard the rationale of its decisions in and since *New York Times* and in First Amendment and due process cases generally over many years, the conclusion is inescapable that the plaintiff must be required to prove the key element of a defamation case—the falsity of the complained-of language.

If a publication cannot be demonstrated to be false, no principle of constitutional law or public policy permits recovery by a plaintiff whose conduct in matters of public concern has been accurately reported to the public, no matter how careless, negligent, grossly negligent, reckless or malicious was the conduct of the publisher in the abstract. In other words, because fault unrelated to any falsity is immaterial, the requirement of *Gertz v. Robert Welch, Inc.* that every libel plaintiff prove fault necessarily encompasses proof of falsity as well. It is only falsity attended by fault—or stated conversely, fault in failing to discover the falsity—which is actionable consistent with constitutional principles protecting speech and press.

Furthermore, in First Amendment cases outside of the defamation area, this Court consistently and properly has rejected any statutory scheme which places on the defendant the burden to prove that his speech is protected by the Constitution. Similarly, considerations of due process and fundamental fairness require that the libel plaintiff bear the burden of establishing that the publication is false and hence unprotected.

The trial record of this case demonstrates indisputably that the only impediment to plaintiffs in their effort to prove the falsity of the articles was the force of the facts themselves. As in other areas of the law where the essential elements of the cause of action must be proven by the plaintiff, there was no reason, in terms of either fairness or public policy, to rely upon the irrational presumption that all defamatory statements are false. To the contrary, placing the burden of proving truth on the defendant violates federal constitutional principles by permitting sanctions on speech not found to be false and by deterring reports on matters of public concern.

ARGUMENT

A PRIVATE FIGURE PLAINTIFF MAY NOT RECOVER FOR DEFAMATION WITHOUT ESTABLISHING THE FALSITY OF THE CHALLENGED PUBLICATION.

A. The rationale of this Court's prior defamation decisions mandates that plaintiffs bear the burden of proving falsity.

Pennsylvania, through a statute which fails to recognize First Amendment limitations upon libel actions, places on the defendant the burden of proving the truth of allegedly libelous publications. The statute's failure to require the plaintiff to prove the falsity of the speech is, as the Pennsylvania Supreme Court held, a codification of prior common law decisions. This common law treatment of the truth issue, however, relieves the plaintiff of responsibility for proving the sine qua non of any defamation suit—falsity. Such an incongruous distribution of burdens of proof regarding the essential element of a libel action was valid under the common law, where defendants' free speech rights were unrecognized. Since 1964, however, this Court has prohibited States from imposing liability in a defamation action involving a matter of public concern without proof of publication of a false statement with

a requisite degree of fault. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Because only false statements of fact published with fault are undeserving of constitutional protection, a state cannot permit the imposition of sanctions on speech without a determination that the publication is, in fact, false. Permitting the defendant to prove truth does not assure that truthful speech will not be punished. Jurors allowed to find liability without first finding that the speech is false are encouraged, particularly in a close case, to resolve their doubts against constitutionally protected speech and in favor of private reputation. Such a resolution directly conflicts with the rationale of this Court's First Amendment decisions.

1. Pre-*New York Times* common law as codified in Pennsylvania.

The Pennsylvania statute at issue, 42 Pa.C.S.A. §8343(b), gives the defendant in a defamation action the "burden of proving, when the issue is properly raised: (1) the truth of the defamatory communication . . ."

This common law advantage to plaintiffs, however, utterly fails to accommodate defendants' free speech rights. As this Court has recognized, libel law "originated in soil entirely different from that which nurtured [First Amendment] constitutional values." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 151 (1967).

It is difficult to overstate just how barren common law soil was compared to the soil in which First Amendment rights are sown. Libel originated in England primarily as a crime intended to suppress sedition; the crime was later expanded, in both England and the American states, to make punishable any writing which tended to bring into disrepute any individual likely to be provoked to a breach of the peace by the words at issue. *Curtis Publishing Co. v. Butts, supra*, 388 U.S. at 151. Originally, common law did not even recognize

truth as a defense. *See generally, Prosser and Keeton on the Law of Torts* 840 (5th ed. 1984). Truth was irrelevant because "neither sedition nor the provocation to a duel was at all lessened because the defamation was true." *Ibid*. Punishment of truthful speech was so incompatible with public policy, however, that truth eventually became a limited defense in criminal libel suits, and, in most instances, a complete defense in civil libel suits. See R. Sack, *Libel, Slander, and Related Problems* 129-131 (1980); L. Eldredge, *The Law of Defamation* §64, at 324-327 (1978). But because the common law presumed that all defamatory words were false, truth was recognized only as a defense, not as an affirmative element in plaintiff's cause of action. (Jt. App. 159). Further, in some states, even the defense of truth was limited, for example, to situations where there were no "malicious motives," or where the publication was for "justifiable ends." L. Eldredge, *supra*, §65, at 328.

In addition to the restricted use of a truth defense, the common law differed from current law in another crucial respect: strict liability was imposed. Publishers were held liable for their defamatory statements, even if published without fault. This harsh result was ameliorated only by the development of a complex system of "privileges" for publications, both absolute (based on the speaker's status) and conditional (based on the occasion on which the statement was made). Keeton, *Defamation and Freedom of the Press*, 54 Tex. L.Rev. 1221, 1222-1223 (1976); R. Sack, *supra*, at 267.

The qualified recognition of truth as a defense and the limited use of privileges were the common law's only acknowledgments of the speech interests of defendants. Libel simply was not viewed as raising any First Amendment considerations. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942). Libelous utterances, under both the common law and this Court's pre-1964 rulings, were viewed as "not being within the area of constitutionally protected speech." *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); *Herbert v. Lando*, 441 U.S. 153, 158 (1979). That view of libel, however, drastically changed in 1964.

2. *New York Times Co. v. Sullivan*

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court constitutionalized the law of defamation and, based on the First and Fourteenth Amendments, imposed limitations upon a State's ability to punish speech concerning public officials. The Court recognized not only that the defense of truth was inadequate to protect the "uninhibited, robust, and wide-open" debate mandated by the First Amendment, *id.* at 270, but that even requiring the plaintiff to prove falsity was insufficient protection when the speech concerns public officials. "[E]rroneous statement is inevitable in free debate [and] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-272 (citation omitted). The Constitution thus mandates "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct *unless he proves* that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-280 (emphasis added).

Subsequent cases, which expanded the scope of the *New York Times* rule to encompass, for example, public figures, left no doubt that *New York Times* placed on the plaintiff the burden of proving falsity as well as constitutional malice. Thus, this Court has repeatedly characterized *New York Times* as allowing the public official or public figure to recover "only if *he establishes* that the utterance was false *and* that it was made with [constitutional malice]." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (emphasis added). *Accord*: *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966); *Herbert v. Lando*, 441 U.S. 153, 176 (1979); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 490 (1975); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 8 (1970).

Indeed, because *New York Times* explicitly placed the burden of proving constitutional malice on the plaintiff (376 U.S. at 279), it would have been completely incongruous to allow plaintiff to recover without also establishing falsity. If,

for example, a reporter proceeded recklessly in gathering information, but the information published nevertheless turned out to be true, neither the reputational interests of the public official/figure nor the First Amendment interests in assuring "unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484 (1957), could justify holding the publisher liable for damages. Fault alone is insufficient; only false statements made with fault are actionable. *See generally*, L. Eldridge, *supra*, §66, at 330. In short, the question of fault, or constitutional malice, is inextricably intertwined with the issue of falsity. A public plaintiff must prove both elements in order to recover.

Thus, when this Court addressed the type of plaintiff at issue here—the private figure—the common law defamation rules already had been fundamentally altered: the burden of proving falsity, as well as fault (constitutional malice), was squarely on all public official/figure plaintiffs.

3. *Gertz v. Robert Welch, Inc.*

In defamation cases involving individuals who are neither public officials nor public figures, this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), recognized that at least where speech involves matters of public concern, it is entitled to some measure of First Amendment protection.[7] *See*

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7. There can be no question that the speech involved in this action concerns matters of public concern. The articles detail how a state senator used his political influence, even obtaining the intervention of the governor's office, to assist a private enterprise. Moreover, the articles report how the same business which received favorable attention from state government was under active federal investigation for its connections with organized crime. Indeed, when asked what his purpose was in writing the first of the articles in suit, the reporter, who had 20 years of experience in covering state government, testified:

> "Well, I thought it was a pretty good textbook example of how things worked in the State government. I think people are taught in school how they ought to work. Very often they don't seem to work that way, and I think one of the functions of a newspaper is to inform people that

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., No. 83-18 (U.S. Sup. Ct. June 26, 1985), slip op. at 1. In view of the lessened First Amendment interests at stake and the greater state concern for the reputations of *private* individuals, the Court struck a different balance than in *New York Times*, requiring proof of some minimal degree of fault to remove the speech from the constitutionally protected zone.

As in *New York Times*, the Court in *Gertz* recognized that the imposition of liability without fault would deter some truthful speech, notwithstanding that the defendant would still have available the defense of truth. 418 U.S. at 340-341. Reiterating the rationale of *New York Times*, the Court noted that the Constitution requires "that we protect some falsehood in order to protect speech that matters." *Id.* at 341. Thus, falsity alone is not enough to support a private figure libel verdict, just as falsity alone is not sufficient in a public official/figure action.[8] In order to protect "speech that matters" (*id.* at 341), a private person must establish some measure of fault with regard to the publication: "[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U.S. at 347 (footnote omitted).

As plaintiffs have conceded throughout this litigation, *Gertz* unquestionably puts the responsibility for proving fault on the plaintiff. The inescapable conclusion is that *Gertz* implicitly placed responsibility for proving falsity on the plaintiff as well. Negligence by itself, after all, is without legal or practical consequence. Only falsehoods published with fault result

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the government is falling short of expectations, and if they're so informed, perhaps they will act in a way through the ballot box which will hopefully bring it closer to the ideal." (Tr. 1583).

8. "It seems clear that the principal concern of the *Gertz* decision is the issue of falsity." Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex. L.Rev. 199, 242 (1976). *See Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. at 498-500 (Powell, J., concurring); *Time, Inc. v. Firestone*, 424 U.S. 448, 458 (1976).

in actionable injury to a plaintiff. Thus this Court has recognized that the decisions in cases from *New York Times* through *Gertz* have "considerably changed" the common law allocation of burdens of proof:

> In years gone by, plaintiffs made out a prima facie case by proving the damaging publication. Truth and privilege were defenses . . . The plaintiff's burden is now considerably expanded. In every or almost every case, *the plaintiff must* focus on the editorial process and *prove a false publication attended by some degree of culpability on the part of the publisher*.

Herbert v. Lando, supra, 441 U.S. at 175-176 (emphasis added).

The unmistakable implication of the Court's defamation cases, therefore, is that a plaintiff must prove both falsity and fault. In fact, at least 15 jurisdictions, after *Gertz*, have held or suggested that a private plaintiff must bear the burden of proving falsity.[9] Indeed, this Court already has recognized

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9. *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A.2d 1317, 1322, n. 6 (1982); *Harrison v. Washington Post Company*, 391 A.2d 781, 783 (D.C. 1978); *Smith v. Taylor County Pub. Co.*, 443 So.2d 1042, 1048 (Fla.App. 1983); *Applestein v. Knight Newspapers, Inc.*, 337 So.2d 1005, 1007 (Fla.App. 1976); *Troman v. Wood*, 62 Ill.2d 184, 340 N.E.2d 292, 299 (1975); *Sivulich v. Howard Publications, Inc.*, 126 Ill. App. 3d 129, 466 N.E.2d 1218, 1220 (1984); *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (Md. App. 1976); *Brennan v. Globe Newspaper Co.*, 9 Med.L.Rptr. (BNA) 1147, 1148 (Mass.Super. 1982); *Lewis v. Equitable Life Assurance Society*, 361 N.W.2d 875, 880 (Minn.App. 1985); *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 491 (Minn. 1985); *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493, 498 (Mo.App. 1980); *Madison v. Yunker*, 180 Mont. 54, 589 P.2d 126, 133 (1978); *Fairley v. Peekskill Star Corp.*, 83 A.D.2d 294, 445 N.Y.S.2d 156, 159 (1981); *Cochran v. Piedmont Publishing Co.*, 62 N.C.App. 548, 302 S.E.2d 903, 904 (1983), cert. denied, 105 S.Ct. 83 (1984); *Horvath v. Ashtabula Telegraph*, 8 Media L.Rptr. (BNA) 1657 (Ohio App. 1982); *Lent v. Huntoon*, 143 Vt. 539, 470 A.2d 1162, 1168 (1983); *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 725 (Va. 1985), cert. denied, Nos. 84-1722, 1723 (July 1, 1985); *Mark v. Seattle Times*, 96 Wash.2d 473, 483, 635 P.2d 1081 (1981), cert. denied, 457 U.S. 1124 (1982). *(Continued)*

the innate relationship between the truth issue and the element of fault: "[D]emonstration that an article was true would seem to preclude finding the publisher at fault." *Time, Inc. v. Firestone*, 424 U.S. 448, 458 (1976), citing *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 498-500 (Powell, J., concurring). This means that if a publisher is found to have been at fault, the article must have been shown to be false.

Whether falsity constitutes a separate "element" of plaintiffs' case is problematic. The Sixth Circuit views falsity and carelessness as the two elements comprising fault. *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 375 (6th Cir.), cert. granted, 454 U.S. 962, cert. dismissed pursuant to Rule 53, 454 U.S. 1130 (1981). The Pennsylvania Supreme Court, on the other hand, originally stated that falsity is not an element of a libel action at all. *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899, 908 (1971). In its opinion in this case, however, the Pennsylvania Supreme Court characterized its statement in *Corabi* as "troubling," and purported to clarify its position by stating that, although falsity is neces-

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Only five state cases, in addition to the decision below, appear to retain the common law distribution of burdens. *Gobin v. Globe*, 229 Kan. 1, 620 P.2d 1163 (1980); *Rogozinski v. Airstream by Angell*, 152 N.J.Super. 133, 377 A.2d 807 (1977), modified, 164 N.J.Super. 465, 397 A.2d 334 (1979); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976); *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612, 623-625 (Tex.App. 1984), cert. denied, No. 84-1639 (June 11, 1985); *Denny v. Mertz*, 106 Wis.2d 636, 318 N.W.2d 141, cert. denied, 456 U.S. 883 (1982). Within three other jurisdictions, decisions on the proof issue after *Gertz* appear to conflict. Compare *Elliott v. Roach*, 409 N.E.2d 661 (Ind.App. 1980) (defendant bears burden of proving truth) with *Local 15 v. International Brotherhood of Electrical Workers*, 273 F.Supp. 313 (N.D.Ind. 1967) (applying Indiana law) (plaintiff must prove falsity); compare *Trahan v. Ritterman*, 368 So.2d 181 (La.App. 1979) (falsity presumed where words are defamatory per se) with *Ward v. Sears, Roebuck & Co.*, 339 So.2d 1255 (La.App. 1976) (plaintiff must prove falsity); compare *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir.), cert. granted, 454 U.S. 962, cert. dismissed pursuant to Rule 53, 454 U.S. 1130 (1981) (plaintiff must prove falsity) with *Memphis Pub. Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978) (defamatory statements are presumed false).

sary for recovery, it is presumed from the defamatory nature of the publication. (Jt. App. 160).

Upon analysis, it appears that falsity is an independent element which may be established without reference to fault; fault, on the other hand, necessarily embraces falsity. A plaintiff simply cannot prove negligence in a vacuum, but must prove a publisher failed to report the truth because it was at fault, or negligent. Negligent conduct which does not result in publication of a false statement of fact cannot amount to "fault" in the constitutional sense. Publication of the truth should never be actionable, even if plaintiff could establish that the defendant arrived at the truth by sloppy or even reckless journalistic methods. *See Time, Inc. v. Firestone, supra,* 424 U.S. at 458. Thus it is falsity, and negligence in failing to ascertain the truth, which are of constitutional dimension. It is in this sense that fault and falsity are intertwined.

In short, when a plaintiff tries to prove that a publisher was careless with regard to the truth, the plaintiff will have to prove falsity as well.[10] Falsity is the "logical predicate" to a finding of fault. Franklin and Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L.Rev. 825, 857 (1984). Before plaintiffs can even focus on defendants' fault in failing to discover truth, they will necessarily have to establish the truth that defendants carelessly failed to discover. Because plaintiff must prove "as a minimum, lack of a reasonable basis for believing the statement to be true, as a practical matter he would first have to establish the falsity of the statement." Keeton, *Defamation and Freedom of the Press supra*, 54 Tex. L. Rev. at 1236.[11] Otherwise, plaintiff would be futilely attempting to prove carelessness in the abstract, try-

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10. *E.g., Wilson v. Scripps-Howard Broadcasting Co., supra,* 642 F.2d at 375; *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A.2d 1317, 1322 n.6 (1982). *See also Fairley v. Peekskill Star Corp.*, 83 A.D.2d 294, 445 N.Y.S.2d 156, 158 (1981); *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688, 698 (Md.App. 1976).

11. Indeed, the elements of fault and falsity will necessarily be linked in the minds of the jurors. "The degree of uncertainty in the juror's mind on the issue of truth and the degree of uncertainty on the issue of carelessness

ing to separate fault from falsity, when in fact falsity is a component of fault.[12]

This widespread recognition that *New York Times* and *Gertz* have, as a practical matter, altered the burden of proof in defamation cases is reflected in the Restatement of Torts. The *Restatement (First) of Torts*, which is identical to the language of Pennsylvania's burden of proof statute, placed the burden of proving truth on the defendant. *Id.*, §613 and comment h (1938). The *Restatement (Second) of Torts*, however, notes the change wrought by *Gertz*:

> The burden of proof of showing fault is undoubtedly upon the plaintiff. If the plaintiff has the burden of showing that the defendant was negligent in failing to ascertain the falsity . . . of the statement . . ., there remains little, if any, significance in the common law position that truth of the statement is a defense to be raised by the defendant and on which he has the burden of proof.

Id., §580B, comment j (1977). *See also id.*, §581A, comment b;[13] §613.

In the charge to the jury in this action, the trial judge focused on the nexus between falsity and fault: after first instructing the jury that the plaintiffs were required to prove

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must be taken into account at the same time in arriving at a conclusion on the issue of fault." *Wilson v. Scripps-Howard Broadcasting Co., supra,* 642 F.2d at 375. Thus, as several commentators have concluded, the burden of proof of falsity must be placed on the plaintiff, together with the burden of proof on the related issue of carelessness, in order to avoid incongruity and confusion in submitting the case to the jury. Keeton, *supra,* 54 Tex. L.Rev. at 1236; Franklin and Bussel, *supra,* 25 Wm. & Mary L.Rev. at 858.

12. *See* R. Sack, *supra,* at 135 ("It is difficult to prove that falsity resulted from negligence unless it is first proved that there is indeed falsity.").

13. Section 581A, comment b, of the *Restatement (Second) of Torts*, states that the common law's placement of the burden of proving truth on the defendant has been eroded, but "the Institute does not purport to set forth *with precision* the extent to which the burden of proof as to truth or falsity is now shifted to the plaintiff" (emphasis added).

falsity, the Honorable Leonard Sugerman charged on the issue of fault as follows (Jt. App. 103, 104):

> The plaintiffs, in order to prove by a fair preponderance of the evidence the seventh element of their libel action, must prove to you by a fair preponderance of the evidence that the allegedly false and defamatory article or articles were written and published negligently—that is, written and published by the defendants without the exercise of reasonable care on their part to determine whether the defamatory article or articles was or were true or false.
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> * * *
>
> You will note again in the context of this case that negligence is defined as the absence of reasonable care which a reasonably prudent or careful person would exercise in order to determine whether a defamatory article was true or false before writing or publishing that article.
>
> You the Jury must decide whether the defendants exercised reasonable care in determining whether a defamatory article or articles were true or false. Remember again, "reasonable care" is defined as that care a reasonably prudent or careful person in the circumstances presented in this case would have exercised to ascertain if a defamatory article or articles was or were false before publishing that article or those articles.

In short, the trial court, in order to define negligence in context, properly instructed that the plaintiff, who bears the burden of proving fault, must necessarily prove falsity.

B. Because those who would punish speech must first prove it is unprotected, a libel plaintiff must prove falsity.

The requirement that a libel plaintiff prove falsity does not flow only from logic and this Court's prior decisions in defamation cases. Viewed more broadly, the requirement is

the natural and compelled outgrowth of the protection afforded all types of speech.

The guiding principle of this Court's "speech" opinions is that the First Amendment attempts to secure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). From *New York Times* through *Gertz* and the recent opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court has recognized that "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana, supra*, 379 U.S. at 74-75. Because speech on matters of public concern is "at the heart of the First Amendment's protection," *Dun & Bradstreet, supra*, slip op. at 9, this Court has provided full protection for truthful information about public affairs, despite its defamatory character. *See Garrison v. Louisiana, supra.* Even some false speech about public affairs is protected to provide the "breathing space" necessary for publishers and broadcasters to fulfill their historic role as disseminators of information. *New York Times, supra*, 376 U.S. at 271-272. *See Bose Corp. v. Consumers Union*, ___ U.S. ___, 80 L.Ed.2d 502, 525 (1984); *Herbert v. Lando, supra*, 441 U.S. at 171-72; *Gertz, supra*, 418 U.S. at 340-341.

Just as a rule imposing strict liability for false speech is constitutionally infirm because of its "chill" on truthful expression (*Gertz, supra*, 418 U.S. at 342), a rule requiring that a publisher prove truth to escape liability will necessarily inhibit robust discussion of public events. *New York Times, supra*, 376 U.S. at 279; *Gertz, supra*, 418 U.S. at 340-41. Truth is an elusive concept, often difficult to prove. *New York Times, supra*, 376 U.S. at 279. Rules compelling a speaker to guarantee the truth of a publication have been rejected because they invite "self-censorship." *Id.; Gertz, supra*, 418 U.S. at 341. As Justice Harlan, concurring and dissenting in *Time, Inc. v. Hill*, 385 U.S. 374, 406 (1967), noted:

> . . . in many areas which are the center of public debate "truth" is not a readily identifiable concept, and putting to the pre-existing prejudices of a jury the determination of what is "true" may effectively institute a system of censorship.

While quantifying self-censorship is difficult,[14] the possibility of imposing liability for true speech is not hypothetical. After surveying all defamation cases reported in the decade after *Gertz*, one group of scholars has concluded that a plaintiff may well "succeed even in a case where the published statement about the plaintiff is true (or at least cannot be disproved)." Bezanson, Cranberg and Soloski, *Libel and the Press, Setting the Record Straight* 32, 1985 Silha Lecture, University of Minnesota (May 15, 1985). Truth and falsity issues are "rarely addressed and are even more rarely decisive in litigation." *Id.* at 23-24. The focus of defamation actions is the fault issue, and particularly where the plaintiff is not required to prove falsity, "it is more than theoretically possible for a plaintiff to win a libel action on the basis of a true statement" by merely concentrating on defendant's conduct. *Id.* at 33. The fault issue, together with placement of the burden of proving truth on defendants, "leaves invitingly open the possibility of winning even when the publication was true or not provably false." *Id.* at 34.

In "public concern" speech cases such as this one, the state's interest in preserving private reputation must yield to the extent necessary to ensure that truthful expression is not punished or, worse, suppressed. Any rule such as that approved by the Supreme Court of Pennsylvania, which elevates

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14. Specific documentation of self-censorship is difficult: "[I]t is virtually impossible to identify the causes of any decrease in investigative journalism or controversial stories." Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L.Rev. 1, 17 (1983). As this Court has repeatedly recognized, however, the problem of self-censorship unquestionably exists. *See generally,* Massing, *The libel chill: How cold is it out there?*, Columbia Journalism Review 31 (May-June, 1985). The impact on smaller media is particularly acute. *See generally*, Franklin, *supra*, 18 U.S.F. L.Rev. at 17-18; *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 490-491 (Minn. 1985).

private reputation over speech on public affairs, especially speech not proven to be false, plainly fails to satisfy the principles of historic First Amendment analysis. Indeed, the common law rule enforced by the Pennsylvania Supreme Court permits, and perhaps invites, punishment of speech that is as consistent with truth as it is with falsity. The protections afforded by the "fault" requirement are of little solace to a publisher who must bear the burden of establishing the truth of the publication.

The rule adopted by the trial judge, which requires plaintiff to establish falsehood and failure to take reasonable precautions to ascertain the truth, properly balances First Amendment concerns. Such a rule is consistent with the rules adopted in other actions seeking to impose liability for speech.

In "speech" cases other than civil defamation actions, this Court has recognized that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). For that reason, statutory schemes which place the burden on the defendant to prove that the speech is protected by the First Amendment have been rejected consistently by this Court. This principle can be traced as far back as the Sedition Act of 1798, Act of July 14, 1798, 1 Stat. 596, which was constitutionally infirm, in part, because it allowed the government to punish speaking as a crime, unless the speaker could prove truth as an affirmative defense. *See* Madison's Report, 4 *Elliot's Debates on the Federal Constitution* 570 (1876); *New York Times, supra*, 376 U.S. at 274-276. The rule was, perhaps, most clearly articulated in *Speiser v. Randall, supra*, at 528-529: "[W]hen the constitutional right to speak is sought to be deterred . . . due process demands that the speech be unencumbered until the [party seeking to inhibit it] comes forward with sufficient proof to justify its inhibition."

The above rule, which requires placement of the burden of proof on the party claiming that speech is unprotected, has

been applied in a variety of contexts. In *Near v. Minnesota*, 283 U.S. 697, 713 (1931), this Court struck down as "the essence of censorship" a criminal libel statute permitting publications to be suppressed unless the publisher could prove that what was written was "true and [was] published with good motives and justifiable ends." Similarly, the Court has invalidated federal statutes that restricted the distribution of allegedly obscene materials through the mail because the distributor was required to "assume the burden of instituting judicial proceedings and of persuading the courts the . . . [materials are] protected expression." *Blount v. Rizzi*, 400 U.S. 410, 418 (1971). A state motion picture censorship scheme also violated free speech rights because the exhibitor was made to assume the burden of persuading the courts that the film was protected expression. "[T]he burden of proving that the film is unprotected expression must rest on the censor." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). Where "the transcendent value of speech" is involved, due process requires the State to bear the burden of persuasion that the speech is outside the First Amendment's protection. *Ibid.* (citation omitted).

In *Speiser* itself, the Court struck down a state property tax provision that required the taxpayer to declare he does not engage in advocacy to overthrow the government. Because the statute employed a procedure which placed on the taxpayer the burden of proof and persuasion of nonengagement in the proscribed speech, it deterred free speech and violated the due process requirement that "speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." 357 U.S. at 529.

There is no reason to treat defamation law differently from other laws that would punish or suppress speech. Particularly where, as here, the risk of liability carries with it the potential for large damage awards, self-censorship and dissipation of speech on matters of public concern, the burden should be on the plaintiff to establish in the first instance that the speech is outside the protected zone. Such a rule, as is demonstrated below, leaves adequate protection for private reputation.

C. Balancing the interests of the parties, fairness considerations dictate that plaintiffs bear the burden of establishing the falsity of a challenged publication.

As the Court recently reiterated, *Gertz* mandates a balancing test, under which the State's interest in compensating a defamation plaintiff is balanced against the publisher's free speech rights. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra,* slip op. at 7. Once the publisher's First Amendment rights are injected into the equation, the common law treatment of the burden of proving truth or falsity cannot stand. The balance tips in favor of the defendant, whose free speech interests are strong and protected by the Constitution, rather than in favor of the plaintiff, whose interest in his own reputation is strong, but does not reach constitutional proportions. *See Paul v. Davis*, 424 U.S. 693, 712 (1976).

As one commentator has stated, there is "a thread of fundamental unfairness" in allowing a plaintiff to file suit, sit back and make defendant prove his case, while the court presumes that "defendant has acted wrongfully" by speaking false words. This common law presumption in plaintiff's favor "runs counter to our usual assumption that a defendant has acted properly unless and until it is proven otherwise." R. Sack, *supra,* at 136. On the other hand, it is completely fair and equitable to put the burden of proving the essential element of falsity on the plaintiff, who seeks to punish allegedly false speech. Such a rule is not unique to libel cases; for example, this Court's treatment of the burdens of persuasion and production in employment discrimination cases provides a helpful analogy for the proper treatment of the burdens in this case.

1. A plaintiff should be required to prove falsity because it is an essential element of a defamation action.

Placing the burden of proving falsity on the plaintiff does no more than require him to prove the key element of his case.

"The sine qua non of recovery for defamation . . . is the existence of falsehood." *Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974). Indeed, those members of this Court who have expressed dissatisfaction with the protection of false speech afforded by the *Gertz* requirement of proof of fault recognize that a plaintiff should be able to vindicate his reputation only upon proving falsity. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra,* slip op. (White, J., concurring in the judgment), pp. 3, 9 n.3.[15]

There simply is no reason to relieve a libel plaintiff of proving falsity, the essential ingredient of a defamation action, just as plaintiffs are not relieved of proof of the key elements in other types of actions.[16]

This Court's exploration of the ramifications of the placement of the burdens of persuasion and production is particularly illuminating in decisions under Title VII of the Civil Rights Act, 42 U.S.C. §2000e, *et seq.,* where plaintiffs made arguments, similar to those made here, regarding the fairness of leaving the burden of persuasion on plaintiffs. These cases provide an apt and useful analogy because Title VII "reflect[s] an important national policy," *USPS Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983), much as defamation law reflects important concerns for robust discussion of public affairs and for the reputations of individuals. Also, similar to defamation law, the discrimination area presents "societal as well as personal interests on both sides of [the] equation." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

Despite the strong societal concerns and the personal interests of the Title VII plaintiff, this Court consistently has

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15. Plaintiff Hepps, when asked why he instituted this action, answered: "To finally get the truth of what happened in Harrisburg, to fight to get my name back, to show that the thrust of these articles was totally false. . . ." (Tr. 2095).

16. Even in Pennsylvania, there is no presumption of falsity in product disparagement cases. *See, e.g., Menefee v. Columbia Broadcasting System, Inc.*, 458 Pa. 46, 329 A.2d 216, 220 (1974); *Young v. Geiske*, 209 Pa. 515, 58 A. 887 (1904).

concluded that "[t]he ultimate burden of persuading the trier of fact [on the essential issue of discrimination] remains at all times with the plaintiff." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). *Accord: USPS Board of Governors v. Aikens*, *supra*, 460 U.S. at 716. *See also Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24, 25 (1978) (defendant need only "articulate" not "prove" nondiscriminatory motivation).

The burden of persuasion never leaves the discrimination plaintiff, even though the plaintiff must prove the absence of nondiscriminatory motivation by the defendant, who has greater access to the relevant evidence. *See Board of Trustees of Keene State College v. Sweeney, supra,* 439 U.S. at 25. This Court rejected the argument that this burden unduly benefits the defendant and hinders the plaintiff. After plaintiff makes out a prima facie case, only the burden of production shifts; that is, the defendant must provide "clear and reasonably specific" evidence both to rebut the adverse inference raised and to provide plaintiff with a full and fair opportunity to challenge defendant's proof. *Texas Community Affairs v. Burdine, supra,* 450 U.S. at 258. Although not bearing the burden of persuasion, "the defendant nevertheless retains an incentive to persuade the trier of fact" on the ultimate issue of discrimination. The defendant's specific evidence would, in turn, provide the plaintiff with the opportunity to challenge defendant's factual assertions. *Ibid.*

This detailed scheme for distributing the burdens of persuasion and production of evidence is equally equitable and appropriate in defamation cases. Defamation plaintiffs must produce evidence creating a prima facie case on the issue of falsity, even if only by denying the truth of the publication. Should defendants fail to challenge that proof, and the jury believes plaintiff's evidence, plaintiff prevails. *Cf. Texas Department of Community Affairs v. Burdine, supra,* 450 U.S. at 254. *See generally*, 9 Wigmore, *Evidence* §2487, at 295 (Chadbourne rev. 1981). When defendant introduces rebuttal evidence tending to demonstrate truth, however, the factfinder must proceed to decide whether the plaintiff has carried his

burden of persuasion. *Cf. USPS Board of Governors v. Aikens, supra,* 460 U.S. at 715.

As in discrimination cases, the burden of persuasion should remain with the libel plaintiff, who seeks to punish speech through an award of monetary damages. Because defamation plaintiffs, no less than discrimination plaintiffs, have a full and fair opportunity to carry their burden of persuasion, there simply is no reason to relieve the libel plaintiff of the burden of proving the key element of falsity.

The jury charge given in this case instructed that, in order to prevail, plaintiffs were required to prove falsity by a preponderance of the evidence, just as they were required to prove all the other elements of their case. If the jury was in doubt because the evidence on the falsity issue was equally balanced, then the defendants would prevail. (Jt. App. 97).

Such a result is just and appropriate. In a close case, where it was not shown to the jury's satisfaction that the publication was false, there should be no recovery for defamation. Fairness considerations, as well as First Amendment principles, do not permit recovery for speech where the evidence is equally consistent with truth as with falsity. Were it otherwise, a plaintiff would be permitted to recover monetary damages for speech which has never been found false, a result contrary to this Court's teaching that truth may not be the subject of sanctions where discussion of public affairs is involved. *Garrison v. Louisiana, supra,* 379 U.S. at 74.

2. The reasons for presuming defamatory speech is false do not withstand analysis.

The Supreme Court of Pennsylvania offered three arguments in support of the common law rule giving the defendant the burden of proof of truth:

(a) Plaintiff enjoys a presumption of good character;

(b) Plaintiff should not be required to prove a negative; and

(c) The publisher has "peculiar knowledge" of the facts.

(Jt. App. 158, 159). The same arguments have been advanced by commentators and some of those courts which have con-

cluded that *Gertz* does not change the common law requirement that defendant prove truth. But the arguments, considered alone or in combination, fail to justify, and indeed cannot justify, a rule which can lead to the imposition of monetary damages for speech which may be true.

a. Presuming good reputation

First, the "underlying premise" of the rule giving defendants the burden of proof is the presumption that any person accused of wrong-doing is innocent until proven guilty. (Jt. App. 158). Like other courts, the Pennsylvania Supreme Court has merely declared that this presumption of innocence "transcended the criminal law." *Ibid. See Corabi v. Curtis Publishing Co., supra,* 273 A.2d at 907, citing *Montgomery v. Dennison*, 363 Pa. 255, 69 A.2d 520 (1949).

As two commentators have noted, however, advocates of a presumption of "innocence" or good character "fail to explain" why a concept meant to benefit and shield a criminal defendant should be available as a sword to a civil plaintiff. Franklin and Bussel, *supra,* 25 Wm. & Mary L.Rev. at 860. In a criminal case, the presumption of innocence is consistent with the notion that any jury error should favor the accused; in a libel action, a presumption of falsity suggests to the jury that in close cases it should err in favor of the plaintiff, a notion inconsistent with the "breathing space" needed for speech on matters of public concern. Applied in libel cases, the presumption of plaintiff's good character and the concomitant presumption of the falsity of the publication, when used as a sword to punish speech which may be true, lacks rationality.

This Court consistently has held, in both civil and criminal contexts, that, in order for a legislature to presume one fact from evidence of another, there must be a "rational connection" between the fact proved and the ultimate fact presumed. Presumption of a fact without a "rational connection" to the proven fact violates the Constitution by denying due process or equal protection. *Ulster County Court v. Allen*, 442 U.S. 140, 165 (1979); *Usery v. Turner Elkhorn Mining Co.*,

428 U.S. 1, 28 (1976); *Tot v. United States*, 319 U.S. 463, 467-468 (1948); *Leary v. United States*, 395 U.S. 6, 33-35 (1969); *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86 (1916); *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910). The latter fact must "more likely than not" flow from the proven fact. *Ulster County Court v. Allen, supra,* 442 U.S. at 165, quoting *Tot v. United States, supra*, 319 U.S. at 467; *Leary v. United States, supra*, 395 U.S. at 36.

A presumption of falsity based upon the defamatory nature of a publication fails to meet these constitutional standards. There is simply no rational connection between the defamatory nature of a statement and the presumption that the statement is false. *Wilson v. Scripps-Howard, supra,* 642 F.2d at 376. Indeed, because the presumption of falsity is itself built upon yet another presumption—that of good character of the plaintiff—it is "so unreasonable as to be a purely arbitrary mandate," *Mobile, J & K. C. R.Co. v. Turnipseed, supra,* 219 U.S. at 43. The presumption of plaintiff's good character and civil "innocence," which in turn leads to a presumption of falsity, simply fails the rationality test required of any presumption.

b. Proving a negative

A second reason relied upon for putting the burden of proof on the defendants is equally unavailing. The Pennsylvania Supreme Court has reasoned that it is more fair to require a publisher to prove his assertion than to require a plaintiff to establish the absence of factual support for the assertion. In other words, it is too burdensome to require a libel plaintiff to prove a negative. (Jt. App. 159). *See also, Corabi v. Curtis Publishing Co., supra,* 273 A.2d at 908.

Placing the burden on the party who has made an affirmative allegation, however, "is not an invariable test, nor even always a significant circumstance; the burden is often on one who has a negative assertion to prove," 9 J. Wigmore, *supra*, §2486, at p. 288 & n. 2. As the cases cited by Wigmore and other commentators demonstrate, "not all negatives are difficult to prove." Franklin & Bussel, *supra,* 25 Wm. & Mary

L.Rev. at 860. Moreover, "courts long have required plaintiffs to prove negatives in many other areas of the law not involving the first amendment." *Id.* at 861 & n. 140. Thus, courts routinely have required parties to prove a negative in tort cases,[17] as well as in criminal law,[18] tax law,[19] discrimination cases,[20] and other substantive areas.[21]

The Restatement also recognizes the ability to prove a negative assertion, including falsity. In an action for slander of title or injurious falsehood, plaintiff must prove that defendant's representations were untrue. *Restatement (Second) of Torts* §651. The comments note that "plaintiff unequivocally has the burden of proving the falsity of the injurious statement." *Ibid.*, comment b. Similarly, *Restatement (Second) of Contracts* §235 (1981) requires a plaintiff to prove the negative assertion that the defendant has not performed his obligations under a contract.

In fact, even the common law recognized a libel plaintiff's ability to prove the very negative assertion at issue here, i.e., that a challenged defamatory statement was not true. "[I]n most jurisdictions, when a common law conditional (qualified) privilege has been established, the burden of proof

17. *E.g., Prentice v. Crane*, 234 Ill. 302, 84 N.E. 916, 918 (1908) (general rule imposing burden of proof on the party asking the court to believe a proposition applies even where he must prove a negative assertion, i.e., that a defendant made false representations).

18. *E.g., Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975) (prosecution must prove absence of heat of passion beyond reasonable doubt, despite difficulties of negating such an argument).

19. *E.g., Rand v. Helvering*, 77 F.2d 450, 451 (8th Cir. 1935) (taxpayer claiming loss in sale of stock must establish that no repurchase agreement existed regarding that stock).

20. *E.g., Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978) (plaintiff in discrimination case must prove absence of non-discriminatory motivation by defendants).

21. *E.g., Beckman v. Lincoln & N.W. R.*, 79 Neb. 89, 112 N.W. 348, 351 (1907) (plaintiff must prove all allegations necessary to his case, even a negative allegation that the condemnor did not intend to use condemned land for his own purposes).

on the issue of truth shifts to the plaintiff." R. Sack, *supra*, at 134, citing cases at n. 21.[22] If even common law acknowledged plaintiff's ability to prove falsity, there is no basis for generally protecting a plaintiff from proving such a negative assertion once a publisher's First Amendment rights are recognized.

c. Who best knows the facts?

Finally, the third reason cited for removing the burden of proof from the plaintiff is seriously deficient. The court below relied upon the general principle that the burden of proof should be placed upon the party with "peculiar means of knowledge of the particular fact in issue." (Jt. App. 158). *See Corabi v. Curtis Publishing Co., supra*, 273 A.2d at 908. While libel defendants undoubtedly know upon what facts they have based their assertions, plaintiffs obviously have best access to information regarding the truth or falsity of any assertions about themselves. "A plaintiff is in the best position to know the facts about his own life and activities that will establish falsity." Keeton, *supra*, 54 Tex. L.Rev. at 1236. Indeed, in many cases the plaintiff only testifies that the allegations against him are false.

A defendant may not, of course, sit back and require plaintiff to challenge its assertions in a vacuum. The facts upon which defendant relied in making the accusations against a plaintiff are, under modern discovery rules, divulged prior to trial.[23] Once the factual basis for the publication has been discovered, the plaintiff, with his "unique

22. *E.g., Peterson v. Mountain States Telephone & Telegraph Co.*, 349 F.2d 934, 936 (9th Cir. 1965) (applying Arizona law); *Stukuls v. State*, 42 N.Y.2d 272, 397 N.Y.S.2d 740, 366 N.E.2d 829, 834 (1977); *Bufalino v. Maxon Brothers, Inc.*, 368 Mich. 140, 117 N.W.2d 150, 158 (1962).

23. *See, e.g., Herbert v. Lando, supra*, 441 U.S. at 176-177. Prior to the adoption of modern discovery rules, plaintiff had little ability to obtain information from the defendant prior to trial, which may explain in part why the common law presumption of falsity remained in effect. But the availability of liberalized discovery makes it possible for a libel plaintiff to meet his burden of proving "a false publication attended by some degree of culpability on the part of the publisher." *Id.* at 176.

knowledge" about his own behavior, has the best access to information that would refute, or support, the accusations made. *See* R. Sack, *supra*, at 136.

Plaintiffs argued to the court below that placing the burden of proving falsehood upon them was unfair, given the reliance by *The Inquirer's* reporters upon the Pennsylvania Shield Law, 42 Pa.C.S.A. §5942. Pursuant to this statutory privilege, which permits reporters to refuse to divulge their sources of information, the reporters refused to identify the "federal sources" who initially told them about Thrifty's connections to organized crime. Reliance upon the Shield Law, however, *had no effect whatsoever* on plaintiffs' ability to meet their burden of proving falsity. The reporters testified fully and candidly as to the information they relied upon in publishing the complained-of articles. And it is that *information*, not the names of *The Inquirer's* confidential federal sources, that plaintiffs needed to know in order to attempt to prove the articles false.

As plaintiffs readily conceded, the thrust of the challenged publications was that the Thrifty chain was connected with underworld figures and organized crime. It was that proposition that was required to be proven false. Some of the "underworld figures," such as Joseph Scalleat, were named in the articles, while others were not. Even the "unnamed" connections, however, were disclosed during the lengthy pretrial discovery process. At trial, the reporters not only named the "underworld figures"—Joseph Scalleat, Albert Scalleat, Sr., Morton Hulse, Ralph Puppo, and Michael Grasso—but explained in detail the "connections" between Thrifty and these individuals.[24] Indeed, not only were documents such as official Pennsylvania Crime Commission Reports reflecting these "connections" testified to and introduced into evidence,[25] but a chart summarizing all of these "connections" was utilized. (Jt. App. 59).

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24. *See, e.g.*, Tr. 1616-1624, 1627-1639, 1658-1679, 1691, 3355-3359.

25. *See, e.g.*, Defendants' Exhibits 4, 6-8, 13-20, 23, 24, 26, 27; Tr. 1955-1956.

Thus, while the identities of the federal investigators were not disclosed, plaintiffs were fully able to respond to the "evidence" provided to *The Inquirer* by these investigators, as well as other facts gathered by the reporters, and to attempt to prove them false. That is, of course, precisely what they attempted to do. Finally, the trial court in no way eliminated the possibility that plaintiffs could sustain their burden of proving falsity by challenging the credibility of the reporters for refusing to identify their sources. Indeed, this precise argument was made repeatedly to the jury in plaintiffs' closing argument. *See, e.g.*, Tr. 3706-3707, 3709, 3714.[26]

In sum, the proper placement of the burden of proof in this "public concern" defamation case cannot turn on the state's treatment of sources of news. The exercise of the Shield Law privilege below in no way added to plaintiffs' burden. On the contrary, the record here documents the detailed nature of the information revealed to plaintiffs and their ability to attempt to prove falsity with specific evidence. Plaintiffs were not hindered in their attempt to meet that burden of proof, other than by the force of the actual facts themselves.

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26. Plaintiffs also contended below that they were entitled to an instruction that the jury could draw an "adverse inference" from *The Inquirer's* failure to identify the sources. (Jt. App. 93). The trial court declined to give the requested charge, but permitted plaintiffs' counsel to argue, as he did repeatedly, that the jurors should draw an adverse inference from defendants' refusal to reveal their sources.

CONCLUSION

Two hundred and fifty years ago, a courageous New York publisher and his Philadelphia lawyer established that truthful speech about governmental affairs, no matter how caustic or vehement, could not be suppressed or punished. Now a Philadelphia newspaper comes before this Court seeking reaffirmation of that principle, first established by John Peter Zenger. Vigorous debate on public issues should not be stifled by requiring a publisher to bear the burden of proving to a legal certainty each word which is written. Such a rule would intrude drastically on the field of free debate and cast a net of timidity over those who would comment on matters of public concern.

The First and Fourteenth Amendments mandate that a libel plaintiff prove that the speech he complains of is false. Accordingly, the judgment of the Supreme Court of Pennsylvania should be reversed and the judgment of the Court of Common Pleas on the verdict in favor of defendants should be reinstated.

Respectfully submitted,

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August 1985